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Supreme Court, U.S.
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No. 03-1497

IN THE

Supreme Court of the United States

CAPTAIN SHERIFF SAUDI,

Petitioner,

v.

MARINE TRANSPORT LINES, INC., Owner/Manager of the Vessel "Marine Atlantic," MARINE TRANSPORT CORP., Owner/Manager of Vessel "Marine Atlantic",

Respondents.

CAPTAIN SHERIFF SAUDI,

Petitioner,

v.

MARINE ATLANTIC, LTD., ACOMARIT SERVICES MARITIMES, S.A.; OSPREY ACOMARIT SHIP MANAGEMENT, INC.; KOCH SHIPPING, INC., and KOCH SUPPLY AND TRADING CO.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS ACOMARIT SERVICES MARITIMES, S.A. AND MARINE ATLANTIC, LTD.

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QUESTIONS PRESENTED FOR REVIEW

QUESTION 1

DID THE DISTRICT COURT CORRECTLY DECIDE THAT PERSONAL JURISDICTION DOES NOT EXIST OVER ACOMARIT SERVICES MARITIMES, S.A. AND MARINE ATLANTIC, LTD. UNDER FED. R. CIV. P. 4(k)(2)?

QUESTION 2

DID THE DISTRICT COURT CORRECTLY DECIDE THAT PERSONAL JURISDICTION DOES NOT EXIST OVER ACOMARIT SERVICES MARITIMES, S.A?

QUESTION 3

DID THE DISTRICT COURT CORRECTLY DECIDE THAT PERSONAL JURISDICTION DOES NOT EXIST OVER MARINE ATLANTIC, LTD.?

QUESTION 4

DID THE DISTRICT COURT ACT WITHIN ITS BROAD DISCRETION IN CONTROLLING ITS DOCKET AND MANAGING DISCOVERY WITH RESPECT TO ACOMARIT SERVICES MARITIMES, S.A., AND MARINE ATLANTIC, LTD.?

QUESTION 5

DID THE DISTRICT COURT CORRECTLY EXCLUDE SAUDI'S LIABILITY EXPERT'S OPINIONS WITH RESPECT TO CORROSION?

CORPORATE DISCLOSURE STATEMENT

Marine Atlantic Ltd.'s ("MAL's") parent company is Monte Christo Shipholdings, Inc. ("Monte Christo"). Monte Christo owns 100% of MAL and is not a publicly traded company.

Acomarit Services Maritimes, S.A., now known as V. Ships Switzerland, S.A. ("Acomarit"), is wholly owned by the V. Ships Group. Close Brothers owns 45% of the parent company.

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OPINIONS BELOW

In addition to the opinions included as appendices to Petitioner Sheriff Saudi's ("Saudi") Petition for Writ of Certiorari ("Petition"), Saudi should have attached as appendices to the Petition the following opinions:

Memorandum and Order dated May 17, 2000, denying Saudi's motion for rehearing of the Order dismissing Acomarit Services Maritimes, S.A. ("Acomarit") for lack of personal jurisdiction. Record Document ("Doc") 91, record pages ("R.") 1165-1145.

Appendix B is the Memorandum and Order dated February 1, 2000, dismissing Acomarit for lack of personal jurisdiction. Doc. 44, R. 399-373.

STATUTES INVOLVED

Contrary to Saudi's assertion, no federal statutes are at issue in this case. The First Question presented by Saudi in his Petition is whether the district court erred in dismissing Acomarit and Marine Atlantic, Ltd. ("MAL") for lack of personal jurisdiction pursuant to "28 U.S.C. § 4(k)(2)." No such statute exists. The Supreme Court has authority, pursuant to 28 U.S.C.A. § 2072 (West 1994 & Supp. 2003), to prescribe rules of procedure and evidence. Saudi's cite is actually to a rule promulgated by the Supreme Court pursuant to the above statute: Federal Rule of Civil Procedure ("FED. R. CIV. P." or "Rule") 4(k)(2), and not a federal statute. For the sake of brevity, Respondents incorporate this paragraph by reference in the discussion below concerning perceived misstatements of law or fact.

STATEMENT OF THE CASE

Saudi filed suit against numerous parties in the Southern District of Texas, including the vessel's operator, Acomarit, and owner, MAL, for alleged injuries arising out of an incident involving a shipboard crane aboard the vessel MARINE ATLANTIC on or about May 17, 1999. While Saudi was being lowered in a crane basket to a stand-by vessel, the crane's boom collapsed causing Saudi to fall into the ocean and allegedly sustain attendant injuries. The incident occurred some sixty miles off the southeast coast of Texas.

On February 1, 2000, the district court dismissed Acomarit for lack of personal jurisdiction. *See* Doc. 44, R. 399-373. Saudi filed a motion for rehearing of the order dismissing Acomarit, which the court denied on May 17, 2000. *See* Doc. 91, R. 1165-1145.

On December 20, 2000, the district court dismissed MAL for lack of personal jurisdiction. *See* Appendix J to Saudi's Petition, p. 110a. Saudi filed a motion for rehearing of the order dismissing MAL, which the court denied on July 24, 2001. *See* Appendix F to Saudi's Petition, p. 70a.

On January 7-10, 2002, the district court held a bench trial as to the remaining defendants, Marine Transport Lines, Inc., and Marine Transport Corporation (collectively "MTL"). On January 25, 2002, the district court entered a final judgment in MTL's favor as to all claims against MTL. *See* Appendix C to Saudi's Petition, p. 6a. On February 25, 2002, Saudi filed a notice of appeal of the district court's order. The Fifth Circuit assigned case number 02-20235 to that appeal.

On April 11, 2002, the district court entered a final judgment addressing the remaining defendants save Jurong Shipyard, Ltd. *See* Appendix B to Saudi's Petition, pp. 3a-4a.. In that final judgment the court noted that the dismissals of Acomarit and MAL were final when entered on January 31, 2000, and December 21, 2000, respectively. *Id.*, p. 4a. Saudi timely filed a notice of appeal as to this order on May 9, 2002, but did not contest the district court's findings concerning the finality of the orders dismissing Acomarit and MAL in his appellate brief.

After the Southern District of Texas dismissed Acomarit and MAL, Saudi filed suit in Pennsylvania and Maryland against Acomarit, and in New York against Acomarit and MAL, among other parties, for the same injuries arising out of the same event. The Fourth Circuit has now affirmed the District Court of Maryland's dismissal of Acomarit for lack of personal jurisdiction. *See Saudi v. V. Ships Switzerland, S.A* , No. 03-1307, 2004 WL 626811 (4th Cir. Mar. 31, 2004). The Third Circuit has now heard oral argument concerning the Eastern District of Pennsylvania's decision, *see Saudi v. Acomarit Maritimes Services* [sic], *S.A.*, 245 F.Supp.2d 662, 681 (E.D.Pa. 2003), dismissing Acomarit for lack of personal jurisdiction. Jurisdictional discovery is nearing completion in the Eastern District of New York.

REASONS FOR DENYING THE PETITION

Supreme Court Rule ("Supreme Court Rule" or "SUP. CT. R.") 10 provides, in pertinent part:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's

discretion, indicate the character of the reasons the Court considers:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power.
>
> * * *
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Saudi presents no issues that warrant consideration by this Honorable Court. As to Respondents Acomarit and MAL, Saudi cites to no United States Supreme Court, United States court of appeals or state court of last resort decisions that conflict with the Fifth Circuit Court of Appeals' decision in

this case. Moreover, the circuit courts have consistently interpreted how Rule 4(k)(2) applies in deciding whether general personal jurisdiction exists under that rule. *See, e.g., Adams v. Unione Mediterranea di Sicurta*, 364 F.3d 646, 651 (5th Cir. 2004) ("We agree with the Seventh Circuit, that a piecemeal analysis of the existence *vel non* of jurisdiction in all fifty states is not necessary. Rather, so long as a defendant does not concede to jurisdiction in another state, a court may use 4(k)(2) to confer jurisdiction."), *citing ISI Int'l, Inc. v. Borden Ladner Gervais LLP*, 256 F.3d 548, 552 (7th Cir. 2001); *Dardana Ltd. v. A.O. Yuganskneftegaz*, 317 F.3d 202, 207 (2d Cir. 2003) (when personal jurisdiction over foreign corporation is based upon Rule 4(k)(2), the due process analysis involves assessing contacts with United States as a whole); *United States v. Swiss Am. Bank, Ltd.*, 191 F.3d 30, 36 (1st Cir. 1999) (same); *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1126 (9th Cir. 2002) (Rule 4(k)(2)

> operates when three conditions are met: (1) the cause of action must arise under federal law; (2) the defendant must not be subject to the personal jurisdiction of *any* state court of general jurisdiction; and (3) the federal court's exercise of personal jurisdiction must comport with due process. Thus, the rule provides for what amounts to a federal long-arm statute in a narrow band of cases in which the United States serves as the relevant forum for a minimum contacts analysis.

citing Swiss Am. Bank, 191 F.3d at 36. (Emphasis in original); *Base Metal Trading, Ltd. v. OJSC "Novokuznetsky" Aluminum Factory*, 283 F.3d 208, 215 (4th Cir.), *cert. denied*, 537 U.S. 822, 123 S.Ct. 101, 154 L.Ed.2d 30 (2002), *citing Swiss Am. Bank*, 191 F.3d at 41, 45; *Consolidated Dev. Corp. v. Sherritt, Inc.*, 216 F.3d 1286 (11th Cir. 2000) (same analysis). Because no conflict exists between the circuit

courts in terms of how each has interpreted Rule 4(k)(2), no need exists for this Court to "settle" the application of this rule as discussed in Supreme Court Rule 10(c).

Because no conflict exists between any judicial decisions in this case, Saudi is left with arguing that the Fifth Circuit's decision "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." SUP. CT. R. 10. Nothing could be further from the truth in this case. The Southern District of Texas and the Fifth Circuit Court of Appeals correctly applied the law to the facts. In the context of a personal jurisdiction challenge, a district court's factual findings are reviewed for clear error, *see Loumar, Inc. v. Smith*, 698 F.2d 759, 763 (5th Cir. 1983), as they are in admiralty cases. *See Dow Chem. Co. v. MV Roberta Taylor,* 815 F.2d 1037, 1042 (5th Cir. 1987); *Boudreaux v. United States,* 280 F.3d 461, 466 (5th Cir. 2002); *Jackson v. OMI Corp.*, 245 F.3d 525, 528 (5th Cir. 2001). "A finding is clearly erroneous if a review of the record leaves 'a definite and firm conviction that a mistake has been committed." *Id., quoting McAllister v. United States,* 348 U.S. 19, 20, 75 S. Ct. 6, 99 L. Ed. 20 (1954). Because the district court's findings of fact were not clearly erroneous and the application of those facts to an analysis of general jurisdiction comports with appellate precedent, the district court correctly dismissed the Respondents for lack of personal jurisdiction. The record on appeal and the district court's analysis of the facts, as affirmed *per curiam* by the Fifth Circuit, demonstrate that the lower court's findings were not clearly erroneous. Respondents discuss Saudi's various factual allegations below.

PERCEIVED MISSTATEMENTS MADE IN THE PETITION

Pursuant to Supreme Court Rule15.2, which provides, among other things, that "[c]ounsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition", Respondents perceive that Saudi made the following misstatements in his Petition, and address each *seriatim*:

1. Saudi asserts in his Petition at page 8, paragraph 3: "Garrett performed his work for Acomarit out of his house in Bethlehem or Nazareth, Pennsylvania."

Remarks: Saudi's jurisdictional argument with respect to Acomarit centers around the activities of Thomas Garrett ("Garrett"), who inspected the port side crane aboard the MARINE ATLANTIC in 1997, more than two years before Saudi's incident on May 17, 1999. Record document ("Doc.") 248, record page ("R.") 3802. During that visit, Garrett did not observe the crane coupling at issue because it was not susceptible to inspection. Doc. 248, R. 3814, 3801.

Garrett was not Acomarit's employee. Saudi deposed Garrett, and the district court "reviewed the record particularly Saudi's supplement and Garrett's deposition testimony, in detail, to determine what the evidence demonstrates regarding Garrett's factual and legal relationship to Acomarit Services Maritimes, Osprey, and Plaintiff." Doc. 264, R. 4180. The district court was fully apprised of Garrett's role in this case before the court entered a final judgment addressing Acomarit. Doc. 264, R. 4189-4175.

Garrett testified that he was an employee of Osprey-Acomarit, Doc. 243, R. 3760, p. 32, lines 15-16, who left the company's employ in February 1999, Doc. 243, R. 3684, p. 119, lines 22-25, approximately three months before Saudi's May 17, 1999, accident, and only worked in the role of an independent consultant on Acomarit's behalf. Doc. 248, R. 3798, p. 312, line 8 through p. 313, line 15. Garrett attended various Acomarit-managed vessels, among others, to address regulatory compliance issues. Doc. 243, R. 3690, p. 88, lines 11-25; Doc. 248, R. 3803, p. 73, line 19 through p. 74, line 20, and p. 75, lines 4-11. Acomarit did not control his services as a consultant. Doc. 248, R. 3798, p. 313, lines 2-10.

Moreover, Garrett was not Acomarit's agent. Doc. 248, R. 3798, p. 313, line 16 through p. 314, line 3. He "had no responsibilities or duties" aboard the vessels he attended. *Id.; see also* Doc. 243, R. 3684, p. 117, line 24 through p. 119, line 18. He could not sign contracts or enter any agreements on behalf any of the vessels that he attended, or any of the management groups for which he worked, including Acomarit. Doc. 248, R. 3798, p. 313, line 16 through p. 314, lines 3, and 13-17. Saudi's allegations that he did not have an adequate opportunity to discover Garrett's role before the district court dismissed Acomarit are without merit because (1) he had an opportunity to conduct discovery, which he failed to do; (2) he failed to request an extension of time to complete his jurisdictional discovery before the district court ruled on Acomarit's pending motion; (3) once Saudi deposed Garrett, the evidence adduced demonstrated that Garrett's activities do not change the jurisdictional analysis; and (4) even if Garrett's testimony did bear upon jurisdictional contacts, Saudi failed to file a Rule 59(e) motion based upon newly discovered evidence.

Nevertheless, Saudi then attempted to bring before the Fifth Circuit ostensible evidence, outside the record, allegedly

obtained in the Pennsylvania action. To that end, Saudi makes the allegation set forth in item number 1 above. In the Pennsylvania action, the district court quoted Garrett's affidavit, which stated, with respect to work at Garrett's home in Pennsylvania: "In most cases, I prepared my reports while still aboard the vessel. In a small number of cases, I completed the preparation of my reports at home. I also occasionally received an e-mail, fax and telephone call relating to ship visits while at home." *Saudi*, 245 F.Supp. at 672. There is no evidence that such reports or communications related to Acomarit-managed vessels.

2. Saudi asserts in his Petition at page 8, paragraph 6: "Osprey agreed to take on Garrett as Acomarit's clandestine employee when the joint venture was formed on June 1, 1994."

Remarks: In the Pennsylvania action, Saudi litigated the issue as to whether a joint venture existed between Acomarit and Osprey-Acomarit. *See Saudi*, 245 F.Supp.2d at 675. The Eastern District of Pennsylvania held that:

> Plaintiff asserts that Osprey-Acomarit and Acomarit entered a joint venture to disguise Acomarit's business affairs carried out by Garrett, its alleged Pennsylvania agent. (Pl.'s Second Supp. Resp. Def.'s Mot. Dismiss at 8). However, Plaintiff has not offered any proof of this alleged joint venture, and indeed the only agreement regarding Osprey-Acomarit's formation is between American Automar and Acomarit Holdings Limited of Bermuda. . . .

Id. Given the Pennsylvania court's holding, Saudi is barred from re-litigating whether a joint venture existed between Acomarit and Osprey-Acomarit. *See e.g., Next Level Communications LP v. DSC Communications*, 179 F.3d 244,

250 (5th Cir. 1999) (setting forth elements of collateral estoppel). The Pennsylvania court's decision demonstrates that jurisdictional allegations based upon the purported joint venture status are without merit.

See also remarks in response to item numbers 1, *supra*, and 10 *infra*. Garrett was not Acomarit's "clandestine employee."

3. Saudi asserts in his Petition at page 9, paragraph 7, third sub-paragraph:

> Garrett, by his own admission, as Port Captain, was responsible for insuring cargo safety aboard the vessels he attended which included the Marine Atlantic. . . . Under these facts as admitted by Garrett, Acomarit, as the manager of the vessel, and MAL, as the owner of the vessel, had sufficient contacts with the United States to be held for jurisdictional purposes pursuant to 28 U.S.C. 4(k)(2) [sic].

Remarks: Although Saudi asserts that "Garrett, by his own admission, as Port Captain, was responsible for insuring cargo safety aboard the vessels he attended which included the Marine Atlantic", Saudi cites to no record evidence in support of this proposition. No evidence exists that any of Garrett's work aboard the Marine Atlantic occurred within the United States. In fact, just the opposite was true. The Marine Atlantic was an ultra large crude carrier that could not enter U.S. waters because of its deep draft. R. 2455. Thus, Garrett's activities aboard the Marine Atlantic do not bear upon Acomarit's jurisdictional contacts with the United States.

4. Saudi asserts in his Petition at page 10: "Saudi served written interrogatories and requests for production seeking

discovery from Acomarit months before the District Court's dismissal. Acomarit's counsel strung Saudi's counsel along by exchanging letters agreeing to answer the discovery. . . ."

Remarks: Saudi failed to request an extension of the discovery period before the district court ruled on Acomarit's motion to dismiss. As a result, Saudi cannot be heard to complain about the district court's ruling on the pending motion, which both sides had fully briefed, because of discovery requests made after the motion was ripe for adjudication.

Acomarit provided its answers to Saudi's first set of interrogatories and requests for production of documents on January 14, 2000, more than two weeks before the agreed date to produce those responses, and more than two weeks before the district court issued its order dismissing Acomarit. Doc. 49, R. 450, 449-439, and 429-424.

Saudi issued his second set of requests for production on November 30, 1999, Doc. 49, R. 434, despite the pendency of Acomarit's submitted motion to dismiss which had been filed on August 27, 1999. Doc. 9, R. 66-56. Saudi filed a response to that motion on September 20, 1999, and a supplemental submission on September 22, 1999. Doc. 14, R. 87-75; Doc. 15, R. 91-88. Acomarit filed a reply brief on October 5, 1999. Doc. 16, R. 100-92. Saudi filed a sur-reply on October 14, 1999. Doc. 19, R. 154-139. These were the only pre-decisional briefs filed in conjunction with this motion. Thus, by October 14, 1999, Acomarit's motion to dismiss was ripe for adjudication. Saudi was not entitled to file any further briefs on this motion without leave of court. Again despite the pendency of the submitted motion, Acomarit nevertheless agreed to use its best efforts to provide responses to Saudi's second requests for production by January 31, 2000. Doc. 49, R. 451.

On January 31, 2000, the district court signed its order dismissing Acomarit for lack of personal jurisdiction. Doc. 44, R. 373. The district court's order granting Acomarit's motion to dismiss rendered moot all discovery issues as to Acomarit. *See Nutis v. Penn Merchandising Corp.*, 610 F. Supp. 1573, 1583 n.17 (E.D. Pa. 1985), *aff'd*, 791 F.2d 919 (3rd Cir. 1986); *In re City of El Paso*, 887 F.2d 1103 (D.C. Cir. 1989) (*per curiam*); *cf. In re San Joaquin Roast Beef v. Union Bank*, 7 F.3d 1413, 1416-1418 (9th Cir. 1993) (effective date of bankruptcy court order is date signed by judge, not date of entry by clerk).

The district court did not abuse its discretion in denying Saudi's motion to compel, which was filed for the first time after the district court dismissed Acomarit. Saudi could have, but did not, make a request to extend the discovery period before the district court ruled on Acomarit's motion to dismiss. The motion to dismiss was fully briefed and ripe for adjudication as of October 14, 1999. From the case's inception through the district court's order of dismissal Saudi neither noticed nor took a single deposition of an Acomarit witness or representative. Saudi cannot ascribe his dilatory actions to Acomarit. The district court's order was completely proper.

5. Saudi asserts in his Petition at page 10: "Acomarit's obstructionist behavior, and its failure to comply with discovery requests, denied Saudi his right to obtain discovery relevant and material to Acomarit's jurisdictional motion before the District Court's dismissal."

Remarks: Acomarit did not obstruct the discovery process nor deny any right to obtain discovery. If a party desires additional time to conduct discovery before a district court rules on a summary judgment motion, or a motion to dismiss converted to a summary judgment motion,

"the general rule requires substantial compliance with Rule 56(f)." *Wichita Falls Office Assoc. v. Banc One Corp.*, 978 F.2d 915, 920 (5th Cir. 1992). Rule 56(f) provides that:

> When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

A "very narrow exception" to the above rule exists. *Wichita Falls Office Assoc.*, 978 F.2d at 919. If the non-movant fails to file a Rule 56(f) motion, in order to obtain a continuance of discovery, the non-movant must establish that he (1) requested extended discovery prior to the court's ruling on summary judgment; (2) put the trial court on notice that further discovery pertaining to the summary judgment motion was being sought; and (3) demonstrated to the trial court specifically how the requested discovery pertained to the pending motion. *Id.*

In this case, Saudi did not file a Rule 56(f) motion as to Acomarit, although Saudi was generally aware of the procedure, and filed similar motions during the same time frame as to defendant Appleton. Doc. 12, R. 73 -71; and Doc. 14, R. 189-178. Before the district court issued its order of dismissal, Saudi filed three briefs, and no others, relating to Acomarit's motion to dismiss: an original response filed September 21, 1999; a supplement filed September 23, 1999; and a sur-reply filed October 14, 1999. Doc. 14, R. 87-75; Doc. 15, R. 9-88; and Doc. 19, R. 154-139. None of those briefs requested an extension of time to conduct discovery

before the district court ruled on the pending motion. *Id.* The first two briefs made no reference to discovery at all, and the third simply advised the court of Saudi's desire for full and complete discovery without demonstrating to the trial court specifically how such discovery pertained to the pending motion. *Id.* Thus, Saudi met neither the general rule, nor the narrow exception set forth in *Wichita Falls Office Associates*. For the foregoing reasons, the district court did not abuse its discretion when it found that Saudi:

> had facts and jurisdictional discovery at his disposal, as he admits, and yet he still failed to make a prima facie showing of personal jurisdiction over Acomarit. Nor did he move timely to propound discovery, to compel, or to request an extension of time. The Court sees little reason to exercise its discretion to allow additional discovery now, when Saudi has still not shown any specific need or expectation to support the possible success of such. Doc. 91, R. 1160.

6. Saudi asserts in his Petition at page 10: "The evidence concerning Garrett's activities as an employee-agent, on behalf of Acomarit in the United States, was not 'available' when the District Court granted Acomarit's jurisdictional motion on January 31, 2000."

Remarks: Same as item numbers 1, *supra*, and 10 *infra*.

7. Saudi asserts in his Petition at page 10:

> Acomarit made jurisdictional misrepresentations. On P.2 of its original Motion to Dismiss for lack of personal Jurisdiction filed in the District Court, Acomarit's [sic] through its counsel stated that Acomarit does not have offices in the United

> States or employees or officers who work or reside in the United States. Neither Acomarit, nor its counsel, ever retracted this statement from August 27, 1999, until January 31, 2000, when the District Court granted its motion.

Remarks: Same as item numbers 1, *supra*, and 10 *infra*.

8. Saudi asserts in his Petition at page 11: "It is now known that a joint venture existed in the past between Acomarit and principals of Osprey Ship Management, Inc. The joint venture, Osprey-Acomarit Ship Management, Inc., was terminated in [sic] December 31, 1998."

Remarks: Same as item number 2 above

9. Saudi asserts in his Petition at page 11:

> The obstructionist activities of Acomarit worked, because the District Court Judge entered an order to Saudi that any further efforts to continue arguments that Acomarit should be included as a named Defendant in his case, after Saudi had been given extensive time to present a primary facie case of personal jurisdiction over Acomarit, would result in monetary sanctions.

Remarks: In response to Acomarit's motion for entry of final judgment, Saudi continued to argue that Acomarit was subject to the district court's personal jurisdiction. Doc. 132, R. 1690. In that response, Saudi presented the district court with an arbitration clause from a time charter agreement between MAL and Koch, which identified New York as the situs for arbitration concerning any disputes arising out of that agreement. Doc. 132, R. 1684. Saudi argued that this clause established a jurisdictional contact between Acomarit

and the United States, and that Acomarit had failed to produce it during discovery. Doc. 132, R. 1690-1689.

Saudi's arbitration clause argument was specious. Acomarit was not a party to the charter party between MAL and Koch, and, thus, was not bound by its terms. Doc. 140, R. 1818-1795; *see also United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 80 S. Ct. 1347, 1353 (1960) ("a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."). A review of the charter agreement shows that Acomarit was not named as a party thereto nor is it referenced therein. Doc. 140, R. 1818-1795. The arbitration clause to which Saudi cited in his opposition to the motion for entry of final judgment made no reference to third parties or to Acomarit specifically. Doc. 140, R. 1795. Acomarit was not bound to arbitrate any dispute involving the MAL-Koch charter agreement in New York.

Saudi's argument was speculative at best. Neither MAL nor Koch demanded arbitration in New York. The arbitration clause was at all times inchoate, and represented no more than a contractual promise between MAL and Koch to arbitrate in New York at some future time in the event of a dispute between those parties. No dispute ever existed between those parties, and Saudi lacked standing to compel arbitration between those parties in New York. *See Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 527-528 (5th Cir. 2000). No arbitration panel ever had jurisdiction to hear any dispute between MAL and Koch in New York, because no such panel was ever convened. In addition, even if arbitration were demanded by one or the other of those parties, such a *post hoc* proceeding could not create a minimum contact of Acomarit at the time of the alleged incident either in Texas or with the nation as a whole. The mere existence of an inchoate New York arbitration clause in the MAL-Koch charter could not serve as a

legitimate basis for arguing that Acomarit was subject to jurisdiction in Texas.

Even assuming, *arguendo*, that Acomarit *was* subject to the New York arbitration clause and the clause constituted a waiver of personal jurisdiction as Saudi's counsel suggested, Doc. 132, R. 1689-1688, that clause does not establish any contact with Texas for purposes of establishing personal jurisdiction, and would have served to defeat Saudi's Rule 4(k)(2) argument because Acomarit, ostensibly, would have submitted to New York jurisdiction under Saudi's reasoning. The availability of 4(k)(2) jurisdiction does not exist when jurisdiction exists in the courts of general jurisdiction in one or more of the states. *See* FED. R. CIV. P. 4(k)(2). Thus, under Saudi's own reasoning, the arbitration clause could not serve as a basis to assert personal jurisdiction over Acomarit in Texas or under Rule 4(k)(2). The inchoate New York arbitration clause, even if it applied, did not augment the minimum contacts necessary to establish personal jurisdiction over Acomarit.

The district court never ordered Saudi not to file a motion based upon newly discovered evidence. The court's admonition in its order of August 31, 2000, to Saudi and his counsel was to not make any further extraneous "*arguments*" and said nothing about motions based upon "*evidence*." Argument is not evidence. Saudi's discussion of the arbitration clause in response to Acomarit's motion for entry of final judgment lacked any evidentiary value for purposes of a jurisdictional analysis. The district court did not abuse its discretion in admonishing Saudi not make further *argument* to include Acomarit as a defendant.

In any event, Saudi never perfected an appellate issue by filing a Rule 59(e) motion based upon newly discovered evidence relating to Acomarit's jurisdictional contacts in this case.

10. Saudi asserts in his Petition at pages 11-12:

> The jurisdictional misrepresentation, i.e. that Acomarit had no employees or agents resident [sic] in the United States, made in the Motion to Dismiss signed by Acomarit's counsel, taints the finding of personal jurisdiction, even if the District Court Judge did not base her jurisdictional dismissal on Rule 4(k)(2) F.R. Civ. P. [sic] [citation omitted].

Remarks: Saudi alleges that Acomarit misrepresented to the district court that it had no employees or officers who work or reside in the United States. These allegations are not true. In its original motion to dismiss, Acomarit represented that it had no employees or officers who worked or resided in Texas. Doc. 9, R. 65. Acomarit has consistently maintained that Garrett was not its employee. See remarks to item number 1, *supra*.

In any event, Saudi failed to depose any Acomarit witnesses or corporate representatives between the time Acomarit filed its motion to dismiss on August 27, 1999, and the date that the district court issued its order dismissing Acomarit for lack of personal jurisdiction on January 31, 2000. Additionally, Saudi failed to request an extension of the discovery period during the pendency of Acomarit's motion to dismiss. Saudi can not be heard to complain when he failed to actively pursue discovery.

Even if Garrett's identity and activities had been known to Saudi before Acomarit's dismissal, that information would not have affected the jurisdictional analysis. After dismissing Acomarit for lack of personal jurisdiction but while Acomarit awaited entry of final judgment, the district court addressed the totality of Garrett's involvement in this case. Doc. 264,

R. 4187-4175. In adjudicating Osprey's motion for summary judgment, the district court reviewed Garrett's December 19, 2000 deposition transcript "in detail", Doc. 264, R. 4180, and could have, but did not, amend its order dismissing Acomarit. Similarly, Saudi could have, but did not, file a Rule 59(e) motion based upon newly discovered evidence. The district court was fully apprised of Garrett's role in this case before the court entered a final judgment addressing Acomarit. Doc. 264, R. 4189-4175. Garrett testified that he was an employee of Osprey-Acomarit, Doc. 243, R. 3760, p. 32, lines 15-16, who left the company's employ in February 1999, Doc. 243, R. 3684, p. 119, lines 22-25, approximately three months before Saudi's May 17, 1999, accident, and only worked in the role of an independent consultant on Acomarit's behalf. Doc. 248, R. 3798, p. 312, line 8 through p. 313, line 15. Garrett attended various Acomarit-managed vessels, among others, to address regulatory compliance issues. Doc. 243, R. 3690, p. 88, lines 11-25; Doc. 248, R. 3803, p. 73, line 19 through p. 74, line 20, and p. 75, lines 4-11. Acomarit did not control his services as a consultant. Doc. 248, R. 3798, p. 313, lines 2-10.

Moreover, Garrett was not Acomarit's agent. Doc. 248, R. 3798, p. 313, line 16 through p. 314, line 3. He "had no responsibilities or duties" aboard the vessels he attended. *Id.; see also* Doc. 243, R. 3684, p. 117, line 24 through p. 119, line 18. He could not sign contracts or enter any agreements on behalf any of the vessels that he attended, or any of the management groups for which he worked, including Acomarit. Doc. 248, R. 3798, p. 313, line 16 through p. 314, lines 3, and 13-17. Saudi's allegations that he did not have an adequate opportunity to discover Garrett's role before the district court dismissed Acomarit are without merit because (1) he had an opportunity to conduct discovery, which he failed to do; (2) he failed to request an extension of time to complete his jurisdictional discovery before the district court ruled on Acomarit's pending motion; (3) once

Saudi deposed Garrett, the evidence adduced demonstrated that Garrett's activities do not change the jurisdictional analysis; and (4) even if Garrett's testimony did bear upon jurisdictional contacts, Saudi failed to file a Rule 59(e) motion based upon newly discovered evidence.

11. Saudi asserts in his Petition at page 12: "Acomarit, through its Port Captain, Tom Garrett, who resided in Pennsylvania and officed [sic] in Bethesda, Maryland, had numerous contacts with the U.S. as the result of Garrett's activities."

Remarks: Same as item numbers 1 and 10, *supra*.

12. Saudi asserts in his Petition at page 12: "The actions of a joint venturer or the agent of a joint venturer are imputed to the joint venturer for jurisdictional purposes. [citation omitted]. All of these decisions gave Acomarit ample opportunity to mislead Saudi."

Remarks: Same as item number 2 above.

13. Saudi asserts in his Petition at page 12:

> In discovery in the Pennsylvania case Garrett confessed that he had attended 15 vessels a year in U.S. ports on Acomarit's behalf, was reimbursed for expenses by Acomarit indirectly through payments to Osprey-Acomarit, and received a salary from Osprey-Acomarit by electronic transfer in his hometown of Nazareth, Pennsylvania. When pressed for records reflecting his financial dealings with Acomarit, Garrett claimed he was required to send Acomarit the originals and did not retain copies.

Remarks: None of this evidence is part of the Record in this case, and amounts to impermissible argument by Saudi. *See Great Plains Trust Co. v. Morgan Stanley Dean Witter*, 313 F.3d 305, 315 (5th Cir. 2002) ("this court is barred from considering filings outside the record on appeal, and attachments to briefs do not suffice."), *citing In re GHR Energy Corp. v. Crispin Co., Ltd.*, 791 F.2d 1200, 1201-02 (5th Cir. 1986).

14. Saudi asserts in his Petition at pages 14-15:

> MAL never denied Saudi's Rule 4(k)(2) jurisdictional allegations but, instead, relied on the fact that it had not been served with process, so that it could defeat application of that rule.
>
> * * *
>
> MAL's failure to deny Saudi's Rule 4(k)(2) jurisdictional pleadings is fatal to the District Court's dismissal. Uncontroverted assertions in jurisdictional pleadings must be taken as true. [citation omitted]. Since MAL never controverted Saudi's allegations of Rule 4(k)(2) against it, but, instead, merely relied upon insufficiency of service of process to defeat application of the rule, Saudi's allegations "must be taken as true."[citation omitted].
>
> * * *
>
> MAL failed to deny, or to controvert Saudi's jurisdictional pleadings under Rule 4(k)(2) F.R.Civ.P. [sic], so the allegations had to be taken as true.

Remarks: Although Saudi argues that MAL failed to raise the Rule 4(k)(2) issue in its jurisdictional pleadings, and, thus, purportedly waived this issue, MAL contested the existence of personal jurisdiction under Rule 4(k)(2) in its Answer. Moreover, a predicate requirement for the assertion of such jurisdiction is effective service of process, which Saudi never made upon MAL. In pertinent part, Rule 4(k)(2) provides that "serving a summons or filing a waiver of service is also effective . . . to establish personal jurisdiction. . ." *See also* district court's order of dismissal, Doc. 237, R. 3616, n.6 ("The Court agrees that by its express terms Rule 4(k)(2) providing for nationwide contacts where there is no personal jurisdiction over a foreign defendant in any state, requi:e [sic] 'serving a summons or filing a waiver of service' to establish jurisdiction.").

The record is devoid of any effort by Saudi to serve process upon MAL, save for the defective service that formed the basis of MAL's motion to set aside entry of default, Doc. 96, R. 1229 to 1202, which the district court granted on August 31, 2000. Doc. 159, R. 2388 and 2370. Saudi's assertion that Hamshaw was served in New York is not correct. Saudi attempted to serve Hamshaw via mail service, but the district court set aside that attempted service as improper. Doc. 159, R. 2391, 2388 and 2370. Between the time Saudi filed his original complaint in June 1999 and the district court's entry of final judgment in March 2002, Saudi never attempted to serve process upon MAL in a foreign country. *See* Civil Docket for Case No. 99-CV-2367. Although Saudi alleges the existence of Rule 4(k)(2) jurisdiction over MAL, a predicate requirement for such jurisdiction is service of process against the non-resident defendant. *See* Rule 4(k)(2). Saudi never met that requirement. Thus, no basis exists to assert Rule 4(k)(2) jurisdiction over MAL.

15. Saudi asserts in his Petition at page 13: "When compelled to produce records, Acomarit responded that it had none, indicating they were destroyed. All of these machinations deprived Saudi of a full and fair opportunity to try the issue of jurisdiction against Acomarit."

Remarks: In the Pennsylvania action, the district court judge specifically addressed Saudi's allegations with respect to Acomarit's alleged destruction of records:

> Plaintiff's bald assertion that Acomarit engaged in a scheme to destroy all of its records reflecting activities in the United States is not supported by any evidence. [citation omitted]. Plaintiff has had a full opportunity for discovery in which to attempt to prove such an allegation, but he has failed to present any evidence supporting this bare claim.

Saudi, 245 F. Supp.2d at 675.

16. Saudi asserts in his Petition at page 15:

> Dismissal of a Complaint on the ground that process has not been properly served is inappropriate when there exists the reasonable prospect that such service may yet be obtained. In such instances, the District Court should, at most, quash service leaving Plaintiffs free to effect proper service. [citation omitted]. Plaintiff had served Robert Hamshaw, as an agent of Marine Atlantic, Ltd. in New York.

Remarks: Saudi attempted service upon MAL by mail to Hamshaw, MAL's assistant secretary, who works in New York for Alpha Export Services, Inc. Doc. 96, R. 1229

to 1202. Upon MAL's motion, Doc. 96, R. 1229 to 1202, the district court set aside the default judgment premised upon that defective form of service, which the Federal Rules no longer recognize as acceptable. Doc. 159, R. 2391 and 2388. Saudi knew of Hamshaw's employment status with MAL as early as May 22, 2000, Doc. 96, R. 1211; Doc. 174, R. 2767, and his location in New York as early as March 7, 2000. Doc. 63, R. 576. Despite Saudi's knowledge of this information, he failed to properly serve Hamshaw with process under Rule 4(h)(1) during the entire pendency of the action in Texas. *See* Civil Docket for Case No. 99-CV-2367.

17. Saudi asserts in his Petition at page 15:

> Nor should a Complaint be dismissed where the Plaintiff is likely to be successful in attempts to serve process where, as here, the 120 day time limit does not apply to the 'vagaries of foreign service' which prevent imposition of a 120 day time limit. [citations omitted]. No 120 day time limit for service applied.

Remarks: Rule 4(m) limits the time for serving process to 120 days from the time a plaintiff files his original complaint and requires dismissal of the case, unless the plaintiff shows good cause. *See Rogers v. Hartford Life and Accident Ins. Co.*, 167 F.3d 933, 937 (5th Cir. 1999) (Rule 4(m) requires "dismissal of a case in which the plaintiff does not accomplish service within 120 days after filing the complaint, unless the plaintiff can show good cause for not doing so."); *see also Bann v. Ingram Micro, Inc.*, 108 F.3d 625, 626 (5th Cir. 1997); *Cross v. City of Grand Prairie*, No. 3-96-CV-0446-P, 1998 WL 133143, at *7 1998 U.S. Dist. LEXIS 3477, at *20 (N.D. Tex. March 17, 1998).[1]

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1. *But see Stanga v. McCormick Shipping Corp.*, 268 F.2d 544, 554 (5th Cir. 1959) (noting that dismissal is not appropriate unless

(Cont'd)

"Under rule 4(m), when a plaintiff fails to serve a defendant within the 120-day period, the district court has two choices: It may either 'dismiss the action without prejudice . . . *or* direct that service be effected within a specified time.'" *Thompson v. Brown*, 91 F.3d 20, 21 (5th Cir. 1996) (emphasis in original). "If good cause exists, the district court *must* extend the time for service. If good cause does not exist, the court *may*, in its discretion, decide whether to dismiss the case without prejudice or extend time for service." *Id.* (emphasis in original). A party may seek additional time for cause shown before the period elapses, or based upon excusable neglect thereafter. *See* FED. R. CIV. P. 6(b).

In this case, Saudi never made an application to extend the 120-day period for serving process. *See* Civil Docket for Case No. 99-CV-2367. After the district court on August 31, 2000, set aside Saudi's first attempt to serve process upon MAL as defective, Doc. 159, R. 2388, Saudi never made any effort to serve process, properly or otherwise, upon MAL. *See* Civil Docket for Case No. 99-CV-2367; *see also Chilean Nitrate Corp. v. M/V Hans Leonhardt*, 810 F. Supp. 732, 735 (E.D. La. 1992) ("dismissal is appropriate only where the plaintiff has made little or no effort to effect proper service."). Moreover, in none of his briefs did Saudi ever present the district court with good cause for his failure to serve MAL with process, nor did Saudi contest his failure to serve MAL with process. Doc. 174, R. 2771 to 2761; Doc. 246, R. 3796 to 3763. Thus, Saudi has not preserved for appeal the issues as to whether good cause existed, and whether the district court correctly found that Saudi did not properly serve MAL with process.

(Cont'd)

"there is no reasonably conceivable means of acquiring jurisdiction over the person of a defendant."). *Stanga* predates Rule 4(m)'s adoption, and does not appear to reflect the Fifth Circuit's current view of service of process requirements under the Federal Rules.

Additionally, one of the cases cited by Saudi stands for the proposition that the foreign country exception to the 120-day rule does not apply where the plaintiff never attempted to serve process in a foreign country.[2] Because Saudi never attempted to serve MAL with process in a foreign country, the 120-day rule still pertains.

18. Saudi asserts in his Petition at pages 15-16, in his discussion concerning MAL's dismissal for lack of personal jurisdiction: "Any order by this Court should make it clear that the District Court's improvident dismissal has no res judicata, collateral estoppel, or issue preclusion effect, because Saudi was denied a full and fair opportunity to litigate the issue of jurisdiction."

Remarks: The Record belies Saudi's assertion that he did not have a full and fair opportunity to conduct jurisdictional discovery. Saudi filed suit in June 1999. The district court's docket control order set the discovery deadline as December 1, 2000. The district court set aside the default judgment entered against MAL on August 31, 2000. MAL then filed its motion to dismiss on September 12, 2000. The district court issued its original order of dismissal on December 21, 2000, and denied Saudi's motion for rehearing on July 24, 2001. Docs. 237 and 274. Ample time (approximately two

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2. *Montalbano v. Easco Hand Tools, Inc.*, 766 F.2d 737, 740 (2nd Cir. 1985)

> Subdivision 4(j), with its foreign country exception to the 120-day period for service, is simply inapplicable here, because [plaintiff] never attempted to serve process in a foreign country under subdivision (i); the 120-day time limit imposed by Rule 4(j) seems therefore perfectly proper, especially since [plaintiff] has not exactly bent over backward to effect service.

Rule 4(m) serves to amend and replace the old Rule 4(j).

and a half months between the filing of the motion to dismiss and the discovery deadline; three months between the time the motion to set aside was granted and the discovery deadline; and almost 18 months since the case's inception) existed to conduct jurisdictional discovery, and Saudi did so as evidenced by his depositions of Robert Hamshaw and Gregory Doyle, both of which the district court considered in ruling as to whether personal jurisdiction existed over MAL. Doc. 237, R. 3615 and 3614; Doc. 274, R. 4272-4266.

CONCLUSION

For the foregoing reasons, Respondents Acomarit and MAL respectfully pray that this Court deny Saudi's Petition for Writ of Certiorari in this case, and for all such other and further relief as may be just and proper.

Respectfully submitted,

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